Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ALLEN H. SMITH,

Petitioner

v.

MARY JANE SMITH,

Respondent

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania.

PETITION FOR WRIT OF CERTIORARI

Allen H. Smith, Esq.
Pro Se

45 N Duke St

York PA 17401

717 854 6609

36 pp

QUESTION PRESENTED

Whether Pennsylvania's recusal standards for judges violate the Due Process Clause by permitting the judge to decide his own case, requiring actual prejudice, and allowing no immediate appeal?

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OPINIONS BELOW

1. The Per Curiam Order of the Supreme Court of Pennsylvania, Middle District, No. 191 MD Misc. Dkt. 1998 denying the Petition for Allowance of Appeal. Dated 9/30/98.

2. The Order of the Superior Court of Pennsylvania, No. 378 Hbg 98, denying the Motion for Reconsideration. Dated 5/15/98.

3. The Order of the Superior Court of Pennsylvania Granting the Motion to Quash filed by respondent herein. Dated 4/21/98.

4. The Order of the Court of Common Pleas of York County, PA, No. 80 S 4440, denying the herein Petitioner's Motion for Recusal. Dated 3/2/98.

STATEMENT OF JURISDICTION

This Court has jurisdiciton of US Constitutional questions passed on or refused to be passed on by the highest state court, where properly raised below. 28 USC 1257 (a).

This Court has taken jurisdiction of collateral orders where petitioners would be subject to long and complex litigation which may be for naught if a preliminary question is not promptly resolved. Mercantile Ntl Bank v. Langdeau, 371 US 555 (1963).

CONSTITUTIONAL PROVISIONS

U.S. Const, amend XIV

> Nor shall any State deprive any person of life, liberty or property without due process of law.

STATEMENT OF THE CASE

Your Petitioner filed a Motion for Recusal with the trial judge citing twenty-two reasons for his recusal. The trial judge, without hearing, without assignment to another judge, without argument, without opinion, without making of a record, refused to recuse himself.

Petitioner appealed to the Superior Court of Penna. Respondent opposed the the appeal as interlocutory. The Superior Court quashed the appeal. It denied reconsideration. The Supreme Court of Pennsylvania refused to hear the case.

REASONS FOR GRANTING THE WRIT

1. Pennsylvania's standards for recusal of judges violate the Due Process Clause of the U.S. Constitution.

2. Pennsylvania permits a judge to rule on his own recusal, and there is no appeal from that until the end of the case.

3. In this case, there was no process at all. The judge denied the Motion in a single sentence, without referral to another judge, and without hearing, and without record.

4. Pennsylvania's recusal standards have been cause for comment. See Villanova Law Review, Vol. 36, No. 3-4, p. 713

(1991) ("Recusal Standards for Judges in Pennsylvania: Cause for Concern")

CONCLUSION

The Court should issue a writ of certiorari to the Superior Court of Pennsylvania.

Respectfully submitted,

Allen H. Smith, Esq.
45 N Duke St
York PA 17401
(pro se)
717 854 6609

IN THE SUPREME COURT OF

PENNSYLVANIA

MARY JANE SMITH,

Respondent

V.

ALLEN H. SMITH,

Petitioner

No. 176 MD Misc
Dkt 1998

ORDER

PER CURIAM:

AND NOW, this 30th day of September, 1998, the request to direct petitioner to refrain from filing any further interlocutory appeals and the Petition for Allowance of Appeal are denied.

TRUE AND CORRECT COPY

ATTEST: October 1, 1998

JOAN L. STEHULAK, ESQUIRE

DEPUTY PROTHONOTARY

IN THE SUPERIOR COURT OF

PENNSYLVANIA

MARY JANE SMITH NO. 378 Hbg 98

V.

ALLEN H. SMITH,

Appellant

ALLEN H. SMITH

V.

HONORABLE OSCAR SPICER

MARY JANE SMITH Middle District

1998

ORDER OF COURT

The Court hereby DENIES the motion for reconsideration filed at No. 378 Harrisburg 1998.

The Court hereby DISMISSES AS MOOT the petition for writ of mandamus filed at No. 20 Miscellaneous Docket Middle District 1998.

PER CURIAM

DATE: May 15, 1998

IN THE SUPERIOR COURT OF

PENNSYLVANIA

MARY JANE SMITH No. 378 Hbg 98

V.

ALLEN H. SMITH,

Appellant

ORDER OF COURT

The Court hereby GRANTS the motion to quash.

The Court hereby DENIED the request for counsel fees.

PER CURIAM

DATE: APRIL 21, 1998

TRUE COPY FROM RECORD

ATTEST: April 22, 1998

Patricia A. Whittaker

Chief Clerk

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

MARY JANE SMITH, Plaintiff
V.
ALLEN H SMITH. Defendant

No. 80 S 4440

ORDER OF COURT

AND NOW, this 2nd day of March, 1998, defendant's Motion for Recusal is denied.

BY THE COURT:

OSCAR F. SPICER
President Judge
51st District
Specially Presiding

cc: Rees Griffiths, Esq.
Leo Gribbin, Esq.

OFS/pr

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

MARY JANE SMITH, Plaintiff

V.

ALLEN H. SMITH, Defendant

No. 80 S 4440

Divorce-Equitable Distribution

PETITION FOR RECUSAL

TO THE HONORABLE, Oscar Spicer, Jr., specially presiding:

1.

Petitioner is Allen H. Smith of 45 North Duke Street, York, Pennsylvania.

2.

Since on or about Oct. 28, 1987, the Honorable Oscar Spicer, Jr., has been presiding over the above captioned matter.

3.

Canon 3.C. of the Code of Judicial Conduct provides that a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where he has a personal bias or prejudice concerning a party.

4.

Judicial conduct is governed by the precept of avoiding not only actual impropriety but even the appearance of impropriety. Com v. Bryant, 328 Pa. Super. 1, 476 A.2d 422 (1985); See Municipal publications, Inc. v. Court of Common Pleas of Philadelphia County, 513 Pa. 163, 489 A.2d 1286 (1985).

5.

The bases for the request for recusal follow:

A. The Master who was appointed by Judge Spicer, did not award counsel fees for wife because he determined that wife was on a par with husband in protecting her rights, and that neither party has established that one or the other was responsible for delay in pursuing litigation. (Master's Report, p. 68, 69)

The Court in its Opinion filed July 23, 1994 found no basis for reversing the findings of the Master that each party bears responsibility for the considerable delay in this case, nevertheless assessed $18,047.91 against your Petitioner for Attorney's fees and expenses of Plaintiff's counsel based on allegedly frivolous appeals. Yet, as of July 23, 1994, only ONE appeal had been sent back to the lower court for the imposition

of costs. The Court deemed improperly, that every appeal of Petitioner that was deemed interlocutory was per se frivolous.

B. Again, on September 23, 1997, the Court awared $14,000.00 additional fees for such "frivolous

appeals." From and after July 23, 1994, only ONE appeal was sent back to the lower court for the imposition of counsel fees.

C. The Order of the additional $14,000.00 in counsel fees was entered in violation of the rules of evidence, procedure and due process. In awarding the $14,000.00 in additional counsel fees, the Court did so without the benefit of sworn testimony as to the fairness and reasonableness of the services rendered, without any testimony that there was a contract between counsel seeking the award and his client, and without the admission into evidence of the document which purported to support the claim for fees and expenses. The allowance of this amount without opportunity

for cross-examination and objection to its use was arbitrary and wholly unsupported by evidence.

D. The Court found your Petitioner in contempt of court for non-payment of counsel fees and expenses in the amount of $17,047.91 without making appropriate findings and without evidence that your Petitioner intentionally did not pay it and that your Petitioner had the wherewithal to pay it.

E. During the course of the proceedings in the above-captioned matter, your Petitioner exercised his privilege against possible self-incrimination. This is a right guaranteed by both the Federal and Commonwealth of Pennsylvania Constitutions. The Court apparently

has become antagnostic to your Petitioner because of the exercise of that Constitutional privilege.

In his opinion of July 23, 1994, the Court charges your Petitioner with "compounding problems" by invoking his privilege against self-incrimination after the IRS audited his tax returns and filed a $750,000 tax lien. "His cooperation in resolving issues of equitable distribution has never been salutary and silence has exacerbated what has never been a good situation." In that same Opinion, the Court wrote: "Generally, defendant's role in these proceedings has been one of passive truculence. He has declined to divulge information citing an ongoing investigation into

tax fraud." (p. 3)

F. The Court, with no knowledge of the facts and with no foundation, concludes that the tax liens against your Petitioner indicate that the defendant has grossly under-reported income. (Opinion of July 23, 1994, p. 4)

G. Because of these large tax liens the Court illogically concluded that because your Petitioner had large tax liens, that Defendant was a very successful lawyer, and by implication, a man of substance.

H. The Court apparently has made all sorts of unfortunate inferences about the background, character, reputation of your Petitioner be-

cause of the existence of large tax liens and the exercise of the privilege against possible self-incrimination.

Let the record reflect that your Petitioner served with the 81st infantry Division during World War II in invasions of Anguar, Peleliu, and inthe campaign in Leyte, served again as an Infantry Officer during the Korean Emergency, was a former Deputy Attorney General with the Commonwealth of Pennsylvania, is a certified teacher in the Commonwealth of Pennsylvania, having taught Senior High School English in excess of four years, taught courses at York College, and Penn State University, York Campus, was a leader of Great Books Classes for many years, was elected

twice by the voters of York County as Recorder of Deeds and has practiced law for approximately 37 years.

I. Counsel for the Plaintiff on September 23, 1997 was permitted to make a completely false representation to the Court as to the content of a Petition filed by your Petitioner, with impunity.

J. Counsel for the Defendant on September 23, 1997 with regard to the sale of stock was met with the following: "I think it is incumbent upon you as an officer of this Court to provide us with a report of how that transaction occurred." (Tr. p. 5) Further the Court said to Defendant's

"...with your representation that you arranged the sale, I think it's incumbent upon you to explain just exactly what happened." (Id, p. 53). And further: "If that's what you(re) representing that's one thing. If you're not sure what happened, then I think you better reconstruct what happened and file a report with me." (Id.)

K. An atmosphere of menace and terror pervades the Courtroom in proceedings before the Honorable Oscar Spicer, Jr. That which is set forth in "J" supra is one illustration. Another standing out in bolder relief occurred during the hearing of September 23, 1997. At that time the Court stated in reference to a subpoena which was to be ser-

ved upon a representative of PNC Bank: " I would strongly suggest that you serve this on somebody locally that we can put in jail."

L. The Court has permitted counsel for the Plaintiff to use a procedure that is apparently unparalleled in the history of Pleadings. Petitions which allege facts may be filed without requiring affidavits of the Petitioner. (See New Matter filed in Response to Petition for Termination of Alimony Pendente Lite, filed July 30, 1997; also Petition for Rule to Show Cause why Allen H. Smith should not be held in contempt of court filed July 30, 1997; and Amended Petition for Contempt filed January 23, 1998)

The Court has permitted Plaintiff's counsel fo file New Matter to Exceptions that were filed by the Defendant. (See "response and New Matter to Defendant's Exceptions" (sic) filed October 24, 1997.

The Court has permitted counsel for the Plaintiff to bring piecemeal Petitions for Special Relief ad infinitum.

M. The Court has permitted Counsel for the Plaintiff, Beverly J. Points, Esq., to write to it, without admonishment, as follows: "Thank you very much for your consideration in this matter. Please feel free to contact me or Rees Griffiths if you have any questions

or wish to discuss this matter."

N. The existence of tax liens against the Defendant was brought to the attention of the Master in the Equitable Distribution Hearing. With full knowledge that these liens attach to real, personal and intangible property owned by the Defendant at the time of the Master's Hearing, the Court nevertheless awarded all real estate, all stock, and most life insurance policies of the Defendant to the Plaintiff in complete disregard of these liens and their priority. The Court in its opinion filed July 23, 1994 indicates that it has no idea what position the Internal Revenue Service will take with regard to

clearing title to the real estate. Nothing was held in escrow to protect the Internal Revenue Service. In the Court's 1925 Opinion of May 24, 1996, the Court indicates that IRS liens against the Defendant have no right to be paid out of the proceeds of the sale of marital stock. In that opinion, the Court determined that Defendant has no shares in or of the stock. Yet, the IRS lien was of record long before the stock was awarded to Plaintiff.

O. Very early in the proceedings in 80 S 4440, Defendant entered an appearance as co-counsel in the case. The Court in a conference call of Feb. 3, 1998 indicated at the next Hearing that he would pro-

bably enter an Order that the Defendant no longer would have the option to proceed "pro se" but would have to proceed through counsel or by himself, but not both. If such a ruling was to be made the Defendant's Sixth Amendment right to counsel would be violated or his right to represent himself would be violated.

P. The Court sent out a notice of a Heairng to be held in August 1997. The notice was sent to the York County Prothonotary, but not to counsel or the parties. The only way Defendant learned of the Hearing date was by inspecting the file for another purpose.

Q. The 1925 Opinion written by the

Court on May 24, 1996 was not forwarded to either Defendant or his counsel or Defendant as pro-se counsel. The Opinion was "faxed" to Attorney Tony Sangiamo who had no involvement in the Appeal and did not and does not represent the Defendant.

R. The Order of Court of September 23, 1997, which held the Defendant in Contempt and imposed certain mandates on counsel for the Defendant, was not filed by the Court until October 3, 1997. When Defendant called the Court Reporter inquiring about non-receipt of the Order, she advised that the Order was typed on September 25, 1997, but it was not filed because the Judge was "circulating it."

S. In the Court's decree of July 25, 1994, the Court said "the case is referred back to the master so that the scheme of distribution may be expeditiously accomplished." No further involvement of the Master has occurred since the filing of his Report.

T. No indication has even been made by Judge Spicer as to whether York County Local Rules or Adams County Local Rules apply in the instant case. As a result, a loose procedure has been used by the Plaintiff's counsel which results in calls to and from the Court Administrator and the Court. The proceedings have degererated to the point where as indicated in "M", supra, Plaintiff's counsel actually invited

the Court to "Please feel free to contact me or Rees Griffiths if you have any questions or wish to discuss the matter."

U. The Defendant filed an Appeal to the Superior Court of Pennsylvania from the Order of Court of September 23, 1997.
Defendant ordered a copy of the transcript of the Hearing and served Judge Spicer's Court Reporter with the Order for transcript on Oct. 22, 1997, by first class U.S. Mail. An acknowledgment of the direction to file a transcript was made by the Court reporter by her letter of Oct. 27, 1997. Defendant sent the Court Reporter the requested check in the amount of $175.00. Although Rule of Ap-

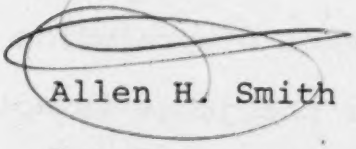
pellate Procedure 1922a requires that the reporter shall transcribe the notes fourteen days after receipt of the Order and payment, Defendant had to file an action in Mandamus on Dec. 15, 1997 against the Court Reporter of Judge Spicer.

V. Although stock was sold and monies placed in escrow for use by the Master, pursuant to Order of Court of April 1, 1996, the Master has never been given any further duties.

5. Under the circumstances, the Honorable Oscar Spicer, Jr. should disqualify and recuse himself from this case to comply with the Code of Judicial Conduct and to avoid even the appearance of impropriety.

WHEREFORE, Petitioner requests that the Honorable Oscar Spicer, Jr. disqualify and recuse himself from this case. Alternately, Petitioner requests a full hearing of this Petition before another Judge on the issue of disqualification.

Respectfully submitted,



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Date: February 23, 1998

EXCERPT FROM

VILLANOVA LAW REVIEW

VOLUME 36 AUGUST 1991 NUMBER 3-4

PAGE 713

Two changes in judicial recusal standards for Pennsylvania are suggested by a look at the laws of other jurisdictions: first whenever feasible, a judge other than the one whose recusal is sought ought to decide a recusal petition; and second, the appropriate standard for recusal is the appearance of prejudice or impropriety, not whether the judge is actually biased or has abused his discretion in declining to recuse himself. Recusal should be required whenever a judge's impartiality might reasonably be questioned. In cases where the challenged judge is willing to grant the recusal motion, referral should not be necessary. Otherwise. the decisionmaker should not be the judge whose recusal is sought. Although the Code of Judicial Conduct does not suggest

that the decision to recuse should be referred to another judge, doing so may help reinstill or maintain the confidence of litigants and the public's perception that state judges are impartial.

(2)

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ALLEN H. SMITH, *Petitioner,*
v.
MARY JANE SMITH, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

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A. This Court lacks jurisdiction because the Order appealed from is not a final judgment or decree. 4

B. The Pennsylvania Court has not decided a federal question in a way which conflicts with an applicable decision of this Court. 7

C. The Pennsylvania Court has not decided a federal question in a way that conflicts with the decisions of other states or the U.S. Court of Appeals 9

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No. 98-1022

IN THE
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ALLEN H. SMITH, *Petitioner,*
v.
MARY JANE SMITH, *Responden:*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny Petitioner's request for a writ of certiorari seeking review of the Order of the Supreme Court of Pennsylvania dated September 30, 1998. The Order in question denied a Petition for Allowance of Appeal from a Decision of the Supreme Court of Pennsylvania after the Superior Court of Pennsylvania quashed an appeal from the trial court on the ground that the trial court Order was interlocutory and denied the Motion for Reconsideration.

OPINION AND ORDERS BELOW

The opinion and orders below are not published. They are set forth in the Petition and as follows:

1. The Order of the Court of Common Pleas of York County, Pennsylvania, No. 98-SU-01846-01, No. 98-SU-02008-01, No. 98-SU-02135-01, No. 98-SU-02261-01, No. 98-SU-02407-01, Memorandum Opinion, Gates, Senior Judge, Specially Presiding, October 16, 1998.

2. The Order of the Court of Common Pleas of York County, Pennsylvania, No. 80-S-4440, finding Petitioner in contempt of court. Dated September 23, 1997.

JURISDICTION

Petitioner cites 28 U.S.C. §1257(a) as the statutory provision which confers jurisdiction and cites *Mercantile Natl. Bank v. Langdeau*, 371 U.S. 555 (1963), as authority for the court to assume jurisdiction of a collateral order. As set forth more fully below, Respondent disputes the jurisdictional basis of Petitioner's request for a writ of certiorari.

STATEMENT OF THE CASE

Respondent Wife filed a divorce action against Petitioner Husband in 1980 (the "Divorce Action"). For

nearly twenty (20) years, Petitioner has filed numerous frivolous, meritless appeals, motions and petitions in order to avoid effectuation of the equitable distribution order entered by the Court.[1]

After being found in contempt of court for failing to comply with various court orders involving effectuation of the Court's equitable distribution order, Petitioner filed a Motion for Recusal of the trial court judge. The Motion was denied in accordance with Pennsylvania statutes and procedures and the Code of Judicial Conduct. On Wife's Motion, the Superior Court appeal was quashed because the lower court Order was interlocutory. Husband requested but was denied reconsideration of the Court's decision, then petitioned the Supreme Court of Pennsylvania to allow an appeal from the Superior Court decision. The Supreme Court of Pennsylvania denied the petition. Husband now petitions this Court for certiorari.

SUMMARY OF ARGUMENT

The Petition should be denied because the trial court Order *sub judice* is not a final judgment or decree. The matter of recusal can be fully reviewed upon appeal at the conclusion of this litigation. The actions taken by the trial court are consistent with prior decisions of this Court, other federal courts and state courts. Pennsylvania's recusal standards and procedures do not conflict with those of other jurisdictions, making review by this Court unnecessary.

---

[1] Husband, a practicing attorney who often appears *pro se*, has filed at least twenty-nine (29) appeals, motions or petitions objecting to actions taken by the Court with respect to the Divorce Action. All have been either dismissed as interlocutory or determined to be irrelevant.

REASONS WHY THE PETITION SHOULD BE DENIED

A. THIS COURT LACKS JURISDICTION BECAUSE THE ORDER APPEALED FROM IS NOT A FINAL JUDGMENT OR DECREE.

Petitioner cannot bring the lower court Order before this Court for review because it is not a final judgment or decree. Only final judgments or decrees rendered by a state's highest court are subject to review. 28 U.S.C. §1257(a). A final judgment is one which effectively determines the litigation. *See Richfield Oil Corp. v. State Bd. Of Equalization,* 329 U.S. 69, 72 (1946). When the order is such that it might otherwise be deemed interlocutory, the Petitioner must show that there is a final assertion of jurisdiction with no further review of that issue possible in the state Court, the threat of serious diversion of national policies and a state Court judgment on an issue anterior to and separable from the merits and not enmeshed in factual circumstances. *See Local No. 438 Construction & General Laborer's Union v. Curry,* 371 U.S. 542, 549-50 (1963).

In the instant case, the Order denying recusal is not a final order because it does not dispose of all claims or parties. *See* Pa. R.A.P. §341. Further, it is not appealable as a collateral order. *See Kenis v. Perini Corp.,* 452 Pa. Super. 634, 682 A.2d 845 (1996); *see also* Pa. Appellate Practice 2d §313:107.5. ("An order of a judge refusing to recuse is not appealable as a collateral order, because the issue can be addressed and resolved on appeal from a final judgment in the case.") Petitioner cites the *Mercantile* case for the proposition that the Court may and has assumed jurisdiction

in cases involving collateral orders in order to avoid long and complex litigation. However, the instant case involves an interlocutory order, clearly subject to appeal and review at the conclusion of this litigation. The *Mercantile* case, wherein the issue determined by this Court involved venue for the litigation, is inapposite to the instant situation. In that case, if the Court did not intervene, a court lacking jurisdiction would have proceeded to hear a case. In our case, the trial Court has had jurisdiction over this litigation for nearly twenty (20) years. Future litigation will be long and complex, regardless of the judge hearing this matter at the trial court level, due to the innumerable motions, appeals and petitions which have and most likely will continue to be filed by Petitioner in order to avoid final adjudication of this matter. Review by this Court will not prevent any unnecessary or improper hearings, as was true in the *Mercantile* case.

Further, Petitioner's initial Motion for Recusal was not timely filed and should not be considered. *See Caminetti v. Pacific Mut. Life Ins. Co.*, 22 Cal. 2d 386, 139 P.2d 930 (1943); *Lawson v. Longo*, 547 So.2d 1279 (Fla. Dist. Ct. App. 1989). A motion requesting disqualification of a judge is not timely if filed after hearing of a matter and entry of an order. *See People in Interest of F.M.*, 44 Colo. App. 142, 609 P.2d 1123 (1980); *In Interest of Smith*, 396 Pa. Super. 624, 579 A.2d 889 (1990) *appeal denied*, 527 Pa. 610, 590 A.2d 296 (1991); *Wakefield v. Stevens*, 249 Ga. 254, 290 S.E.2d 58, *on remand* 163 Ga. App. 40, 292 S.E.2d 516 (1982). If Petitioner wished to object to the trial judge's involvement in this matter, such motion should have been made before hearing. Instead, Petitioner did not object to the trial judge's involvement until over ten (10) years after this judge began considering this matter and conducting hearings. In fact, significantly, Petitioner only asked that the judge be disqualified after Petitioner was adjudicated to be in contempt of court.

Accordingly, based on both Petitioner's long delay in requesting recusal of the trial court judge, as well as the interlocutory nature of the Order, the Petition lacks a jurisdictional basis.[2]

B. THE PENNSYLVANIA COURT HAS NOT DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH AN APPLICABLE DECISION OF THIS COURT.

Assuming, *arguendo*, that the trial court's Order denying recusal could be considered final, the contents of the Order are consistent with applicable decisions of this Court.

The Court previously was asked and declined to consider situations analogous to the instant case wherein parties asked that judges be recused. *See Justus v. Commonwealth*, 222 Va. 667, 283 S.E.2d 905, *cert. den.* 455 U.S. 983, *habeas corpus proceeding* 479 U.S. 1101, *habeas corpus proceeding* (C.A.4 Va.) 897 F.2d 709, *reh. den., en banc* (C.A.4 Va.) 1990 U.S. App. Lexis 4943; *see also Com.*

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[2] Even if the Order was a final Order and subject to review at this time by the state appellate courts and this Court, it is unlikely that the Order would be reversed and the trial judge removed from further consideration of this matter. When a separate judge reviewed the facts and pleadings of this case in order to adjudicate related claims between Petitioner, Respondent and Respondent's counsel, that judge commented that final adjudication of the Divorce Action had been "shamefully protracted" due to the "rich variety of answers, petitions, motions and numerous unsuccessful interlocutory appeals" filed by Petitioner. That judge dismissed with prejudice, *sua sponte*, five proceedings filed by Petitioner against Respondent and her counsel, finding that Petitioner's claims and allegations were meritless. Based on this commentary on Petitioner's actions and disposition of Petitioner's claims by a separate trial judge, Respondent believes that any reviewing Court would not find that Orders against Petitioner in the Divorce Action by the trial judge were unfair, prejudicial or biased.

v. Miller, 541 Pa. 531, 664 A.2d 1310, *cert. den., Miller v. Pennsylvania*, ____ U.S. ____, 116 S.Ct. 932, 133 L.Ed.2d 859 (1995).

Similarly, this Court has declined to rule in other cases, indicating that the entry of rulings adverse to a party does not constitute bias or necessitate disqualification of a judge or review by this Court. *U.S. v. Azhocar*, 581 F.2d 735, *cert. den.* 440 U.S. 907 (1978). Significant to our case, these cases have held that information or evidence adduced during trial of a matter does not necessitate disqualification of a judge. All of the alleged instances of bias cited by Petitioner to support his motion for disqualification occurred during the nineteen-year trial of this matter. Therefore, Petitioner's claims of bias or prejudice do not warrant review both because his claims are meritless and because the Orders entered in this case are consistent with well-established, previously reviewed precedent. *U.S. v. Phillips*, 664 F.2d 971, *cert. den. Meinster v. U.S.*, 457 U.S. 1136, *Myers v. U.S.*, 457 U.S. 1136 and *Platshorn v. U.S.*, 459 U.S. 906 (C.A. Fla. 1981). Under federal statutes, as well as a multitude of cases decided under federal and state law, these alleged instances of bias by the judge are insufficient to establish cause for disqualification. *See* 28 U.S.C.S. §144, 455; *U.S. v. Phillips, supra.*

C. THE PENNSYLVANIA COURT HAS NOT DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISIONS OF OTHER STATES OR THE U. S. COURT OF APPEALS.

Petitioner cites a single Law Review article in an attempt to establish that the Petition raises an important federal question and/or that there is conflict among the courts

with respect to recusal of judges. However, directly contradicting the single article cited by Petitioner, commentators have reported that, like Pennsylvania,

> "[i]n many jurisdictions, the judge determines the question of his own disqualification; the determination of whether the judge should disqualify himself is committed to the judge's discretion, which should be exercised in light of the state's Code of Judicial Conduct, and in consultation with the judge's own emotions and conscience regarding his or her capacity to rule fairly."

46 Am. Jur. 2d, "Judges," §214. *See Haddad v. Gonzalez,* 410 Mass. 855, 576 N.E.2d 658 (1991). Other jurisdictions permitting review of a recusal petition by an individual judge include Alaska (*Feichginger v. State*, 779 P.2d 344 (Alaska App. 1989)); Arkansas (*Korolko v. Korolko,* 33 Ark. App. 194, 803 S.W.2d 948 (1948)); Maine (*Brendla v. Acheson,* 554 A.2d 798 (Me. 1989)); Utah (*State v. Byington,* 114 Utah 388, 200 P.2d 723 (1948)); and Virginia (*Taylor v. Taylor,* 185 Va. 126, 37 S.E.2d 886, *reh. den.* 185 Va. 416, 38 S.E.2d 449 (1946)).

Further, as noted previously, courts considering recusal have clearly established that disqualification of a judge for bias or prejudice is not required or appropriate when that judge has acquired opinions or beliefs regarding the merits of a party's position or claims, provided that the judge's opinions or beliefs do not result from extra-judicial sources. *See Haddad, supra.*; *Johnson v. Trueblood*, 629 F.2d 2987 (3rd Cir. 1980); *Brendla, supra.*; *In re Estate of Lang*, 398 N.W.2d 569 (Minn. Ct. App. 1986).

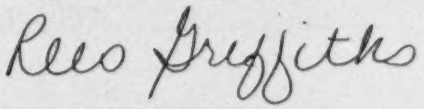
Accordingly, as demonstrated by the numerous decisions cited herein, the Order denying Petitioner's Motion

for Recusal was not a violation of any constitutional right of Petitioner and was in accordance with the statutes and guidelines of Pennsylvania and numerous other states and federal courts.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,



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IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

ALLEN H. SMITH,	:	
Plaintiff	:	Nos. 98-SU-1846-01
v.	:	98-SU-02008-01
BEVERLY POINTS,	:	98-SU-02135-01
REES GRIFFITHS, and	:	98-SU-02261-01
BARLEY, SNYDER,	:	98-SU-02407-01
SENFT & COHEN,	:	
Defendants	:	

***

ALLEN H. SMITH,	:	
Plaintiff	:	
v.	:	No. 98-SU-02407-01
MARY JANE ST. ONGE,	:	
Defendant	:	

ORDER OF COURT

AND NOW, to wit, this 16th day of October, 1998, upon consideration of the briefs of the parties and after hearing oral argument, it is the Order of this Court that the Complaints are dismissed with prejudice.

BY THE COURT

(Signed), S.J.
G. THOMAS GATES,
Senior Judge
Specially Presiding

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

ALLEN H. SMITH,	:	
Plaintiff	:	Nos. 98-SU-1846-01
v.	:	98-SU-02008-01
BEVERLY POINTS,	:	98-SU-02135-01
REES GRIFFITHS and	:	98-SU-02261-01
BARLEY, SNYDER,	:	98-SU-02407-01
SENFT & COHEN,	:	
Defendants	:	

***

ALLEN H. SMITH,	:	
Plaintiff	:	
v.	:	No. 98-SU-02407-01
MARY JANE ST. ONGE,	:	
Defendant	:	

APPEARANCES:

ROBERT J. STEWART, ESQUIRE and
PAUL W. MINNICH, ESQUIRE FOR DEFENDANTS

ALLEN H. SMITH, ESQUIRE PRO SE

MEMORANDUM OPINION, GATES, SENIOR JUDGE, SPECIALLY PRESIDING, OCTOBER 16, 1998.

This shamefully protracted divorce proceeding began more than twenty years ago when Mary Jane Smith (now Ms. St. Onge) separated from Allen H. Smith, an Attorney. The divorce proceedings however did not commence until 1980.

From that date forward Mr. Smith has deluged the Court with a rich variety of answers, petitions, motions and numerous unsuccessful interlocutory appeals. It is obvious that he is resisting the Court's Equitable Distribution Decree with every tool in a lawyer's chest.

Throughout these proceedings Ms. St. Onge has been represented by Beverly Points, Rees Griffiths, Barley, Snyder, Senft & Cohen, LLC. Having exhausted his dilatory proceedings in the divorce case, Mr. Smith now directs his attention and energies to attacking his former wife's lawyers. In this regard he has filed four civil lawsuits claiming damages against the law firm and a fifth action against his former wife for allegedly employing and encouraging her lawyers to take action in conjunction with the divorce proceeding.

The Defendant lawyers now ask that these proceedings either be dismissed for failing to state a cause of action or transferred to and be consolidated with the divorce proceeding presided over by the Honorable Oscar F. Spicer,

the President Judge of Adams County who is specially presiding in the divorce case and before whom Mr. Smith must appear in the contempt proceeding.

In the lawsuit filed to No. 98-SU-02008-01 Smith complains that the Defendants have subpoenaed witnesses in the discovery process in violation of Rule 1701 of the Pennsylvania Rules of Appellate Procedure. We fail to see the applicability of the Rule. The trial Court has taken no action. The Defendants, as part of the divorce action, are attempting to determine if Mr. Smith improperly dissipated marital assets of stock and the inquiry is quite relevant to the enforcement of the Decree of Marital Distribution as well as what appropriate sanctions should be imposed for Mr. Smith's contempt of the Court Order. Thus we do not believe that the conduct alleged in this Complaint is actionable and we shall dismiss it.

In action No. 98-SU-02261-01 Smith also complains about a subpoena directed to another bank seeking information concerning marital and non-marital property. He

complains that the information sought by the Defendant attorneys has proved or may prove to be harmful to the Plaintiffs. It certainly may be but that is its purpose in order to provide the court with information necessary to carry out the Decree of Marital Distribution and to impose appropriate contempt sanctions. It is not unlawful conduct by aiding and abetting a breach of fiduciary duty on the part of the bank as the Defendant contends. Plainly no cause of action has been made out in this Complaint and it too will be dismissed.

In Action No. 98-SU-02135-01 Smith complains about Judge Spicer's award of counsel fees on two separate occasions based in part upon the fact that Mr. Smith has unduly burdened Ms. St. Onge by taking numerous fruitless appeals. If Smith has a remedy it is by way of the appellate process and not by the institution of a lawsuit against the beneficiaries of the Court's Order. Any complaint that Smith has about the nature and amount of counsel fees awarded in a divorce proceeding does not form the basis of a separate and independent lawsuit alleging that the defendants "maliciously

intended to abuse and did abuse the order of the Superior Court." As a consequence we will dismiss this action.

In Action No. 98-SU-01846-01 Smith complains that the Defendants maliciously and unlawfully was removed from his law office at 47 N. Duke Street and that his personal property was unlawfully seized.

In the Divorce Proceeding the trial judge entered a Decree that all real estate is to be either sold or distributed to Ms. St. Onge. It is the attempts to enforce this Decree that Mr. Smith basis this Complaint. However, in order to effectuate the Decree, the Defendants filed a motion to enforce the Decree and the Judge, by an Order dated February 3, 1997, again found that all real estate should be distributed to Ms. St. Onge. The Order granted her the right to list the property with any broker she chooses and deems suitable in order to sell the property. On the other hand, Mr. Smith ignored the Order and, without requesting the Court for clarification, if any was needed, refused to allow access to

the property and appropriate enforcement proceedings were necessary.

Again we find that the Defendants actions do not form the basis for a separate and independent lawsuit. They had a duty and obligation to their client to attempt to obtain satisfaction of the Court's order. Consequently, if he has any complaints about this matter. They should have been addressed to the Court in the Divorce Proceedings. Thus we shall dismiss this complaint.

Finally, in Action No. 98-SU-02407-01 Smith complains that his former wife engaged the services of the law firm of Barley, Snyder, Senft & Cohen who have engaged in activities that have resulted in three abuse of process suits having been filed against them and one suit for aiding and abetting a breach of fiduciary relationship. He complains that she is guilty of either a negligent tort or an intentional one by engaging or encouraging her attorneys to commit the acts which he claims forms the basis for the foregoing lawsuits. Inasmuch as we find that there was no

misconduct on the part of Ms. St. Onge's counsel; that they acted appropriately under the circumstances; there is no basis upon which they can be successfully sued. It follows then that there can be no liability on the part of Mary Jane St. Onge for employing them.

We have given careful consideration to the briefs of counsel and we are discouraged to find that, within limits, the law allows the use of process to frustrate and effectively defeat valid claims for Marital Distribution. These proceedings must be brought to an end and unfortunately the only remedy appears to rest with the Judge before whom the Plaintiff here will stand to justify his contemptuous conduct. We are at a loss to do anything to effectively end the Divorce Proceedings and to assure Ms. St. Onge that she receives full satisfaction of the Court's decrees. However, we can and we shall promptly dismiss all of these meritless complaints.

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA
Civil

Mary Jane Smith 80-S-4440

vs.

Allen H. Smith

ORDER OF COURT

AND NOW, this 23rd day of September, 1997, after a hearing, the Court enters the following rulings:

1. With respect to the shares of PNC Bank which should be part of equitable distribution and the status of which cannot presently be determined, the Court directs that this matter be continued until October 29, 1997, at 1:00 o'clock p.m. The Court will sign an order prepared by Plaintiff's counsel directing that PNC Bank produce its records either to the parties prior to that time or to the parties and the Court on that date.

At the time set, counsel for Defendant shall provide the Court with a detailed written statement describing the transaction whereby certain stock in PNC

Bank was sold and the proceeds applied to the Master's fees and costs. There's a question at this time as to precisely what stock was sold. Testimony indicates that a portion of jointly held stock was sold and that counsel for the Defendant handled the transaction. The request for an adjudication of contempt regarding that stock is deferred pending the outcome of the hearing on October 29, 1997.

2. The petition for an adjudication of contempt for failure to pay attorneys fees previously ordered in the equitable distribution decree is granted. The Defendant is adjudicated in willful contempt of Court. The Defendant's plea to schedule payments in this matter is refused for lack of supporting evidence. Sentence is deferred pending the outcome of the hearing on October 29, 1997. Furthermore, Defendant is directed to pay an additional $14,000 in attorney's fees for frivolous appeals since the order was entered under which Defendant is adjudicated in contempt.

3. The request for termination of alimony pendente lite is denied. It is obvious that this case is not yet finished and that the alimony should continue.

Costs shall be paid by the Defendant.

BY THE COURT,

(Signed)
Oscar F. Spicer
Specially Presiding

Rees Griffiths, Esq.
Leo Gribbin, Esq.
rhk

smithbsc